

**IN THE COURT OF APPEAL OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA**

Ratnayaka Mudiyansele  
Chandrasena,  
Apple Farm,  
Mahakudugala.  
Petitioner

**CA CASE NO: CA/WRIT/6/2015**

Vs.

1. W.T.B. Dissanayake,  
Divisional Forest Officer,  
Forest Department,  
Nuwara Eliya.
2. D.G. Kumarasiri,  
Divisional Forest Officer,  
Forest Department,  
Nuwara Eliya.
3. A.M.A.U.S. Fernando,  
Conservator General of Forests,  
Rajamalwatta Road,  
Baththaramulla.
4. I.K.G. Mutubanda,  
The Divisional Secretary,  
Walapane Divisional Secretariat,  
Walapane.  
Respondents

Before: Mahinda Samayawardhena, J.  
Counsel: Faisz Musthapa, P.C., with Gamini Senanayake  
for the Petitioner.  
Suranga Wimalasena, S.S.C., for the  
Respondents.  
Decided on: 02.12.2019

Mahinda Samayawardhena, J.

Several Petitioners, 40 in number, filed similar applications seeking to quash by way of writ of certiorari the Notice to Quit dated 31.12.1992 (P12) served on them under section 3 of the State Lands (Recovery of Possession) Act, No.7 of 1979, as amended, requiring them to hand over vacant possession of the land to the 1<sup>st</sup> Respondent on or before 01.02.1993.

The learned junior counsel for the Petitioners informed Court that these applications can be largely divided into two categories—the Petitioners to whom Permits have already been issued under the Land Development Ordinance, and those to whom Permits have not been issued, but who have long been in possession of the land.

Hence, the Court was invited to deliver two Judgments, one in CA/Writ/11/2015 to be applicable to Permit Holders, and the

other in CA/Writ/6/2015 (the present case) to be applicable to others.<sup>1</sup>

However, the pleadings and written submissions filed by both parties are very similar. Hence, this Judgment will be applicable to all the cases mentioned in the List dated 26.11.2018 filed by the Attorney at Law of the Petitioner, with a copy to the Attorney at Law of the Respondents.

There is no dispute that the land in issue is a State Land.

The position of the Petitioner, as stated in the petition dated 15.12.2014 but presented to Court on 12.01.2015, is that in or around 1972, a land, approximately 300 acres in extent, at Mahakudugala, Walapane, Nuwara Eliya, was released to promote apple cultivation. In order to facilitate that purpose, a society by the name of Apples Growers' Co-operative Society was formed in Nuwara Eliya.

The Petitioner in paragraph 1 of the petition states that:

*This society was established to promote apple cultivation and to distribute plots of lands amongst the members of the*

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<sup>1</sup> Vide the proceedings dated 19.10.2018 in Case No. CA/Writ/11/2015, and the List of Cases filed by the Attorney at Law of the Petitioner with the motion dated 26.11.2018 in Case No. CA/Writ/6/2015.

In addition to the cases mentioned in the said List, there are 15 more similar cases yet to be supported, which the learned President's Counsel for the Petitioner wished to do, after the delivery of the Judgment in this case.

Those cases which are yet to be supported seem to be: CA/Writ/87/2016, CA/Writ/88/2016, CA/Writ/89/2016, CA/Writ/90/2016 (challenging the Gazette P22); and CA/Writ/12/2015, CA/Writ/21/2015, CA/Writ/27/2015, CA/Writ/32/2015, CA/Writ/36/2015, CA/Writ/38/2015, CA/Writ/40/2015, CA/Writ/43/2015, CA/Writ/48/2015, CA/Writ/49/2015 and CA/Writ/302/2016 (challenging the same Quit Notice P12).

*said society for this purpose. The Petitioner who was a member of the Apple Growers Co-operative Society Mahakudugala was granted the said land which is the subject matter of this application by the Government by an informal arrangement pending the issue of a permit to the Petitioner.*

Thereafter, according to the Petitioner, valuation was done by the Government valuer in order to determine the tax payable, and the Petitioner paid the relevant taxes and related fees, after which he was handed over a portion of land in 1974.

The Petitioner in the petition has narrated several Notices of Quit served under the State Lands (Recovery of Possession) Act and lawsuits instituted in different Courts against different parties (members of the Apple Growers' Society) to whom possession was allegedly handed over by the State for apple cultivation. I think this has historical value, but no direct bearing to the matter in issue.

As I stated at the outset, the Notice to Quit sought to be quashed in this application and all the other connected applications is the one dated 31.12.1992 marked P12.

Let me now consider on which grounds the Petitioner and all the other Petitioners in connected cases seek to quash that Notice to Quit by certiorari. These grounds, which are common to all the applications, have been listed by the Petitioner in paragraph 28 of the petition. That paragraph reads as follows:

*The Petitioner states that the said Quit Notice dated 31.12.1992 (P12) referred to in paragraph 13 hereof and sought to be enforced by the Magistrate's Court of Walapane issued on the Petitioner by the Respondent purportedly under section 3 of the State Land (Recovery of Possession) Act is illegal, null and void and of no force or avail in law in as much as:*

- a) The Respondent is not the Competent Authority and as such ultra vires the provisions of the State Land (Recovery of Possession) Act*
- b) The said Notice (P12) has been issued totally without jurisdiction and unsupported by evidence*
- c) The Petitioner has been in long, peaceful and uninterrupted possession of the said land for their private use and enjoyment for over 40 years and acquired a prescriptive title thereto*
- d) The said Notice (P12) is in violation of the Petitioner's legitimate expectation that, upon obtaining permission from the 2<sup>nd</sup> Respondent to cultivating apples, he would be able to cultivate on the said land without any hindrance*
- e) The said Notice (P12) offends the principles of proportionality for the reason that large sums of money had been invested on the said land*
- f) The Petitioner having expended large sums of money and having effected improvements, is entitled to*

*exercise the right of jus retentionis and therefore cannot be unlawfully evicted from the premises*

- g) The purported Notice (P12) has been issued contrary to the objectives sought to be achieved by the State Land (Recovery of Possession) Act No.7 of 1979, and as such, is ultra vires the provisions of this Act*
- h) The purported decision to issue the said Notice (P12) has been occasioned by collateral and extraneous reasons*
- i) The purported decision to issue the Notice (P12) is unreasonable and violative of the Petitioner's fundamental rights guaranteed to them under Article 12(1) of the Constitution*
- j) It is in violation of legitimate expectation created by the holding out by the State in SC Appeal 20/2013 that the Petitioner's and other occupants would benefit by the release of said land*
- k) The said notice is outside the ambit of the State Land (Recovery of Possession) Act No.7 of 1979 and has not been issued for the purpose of protecting state land.*

The Respondents have filed objections to this application.

The Petitioner, in the written submission states, "*The Hon. Attorney General filed objections on behalf of all the Respondents*

*and merely denied the averments of the petition without any justification.”<sup>2</sup>*

Having said so, after the said objections of the Respondents, the Petitioner has filed extensive counter objections/counter affidavit running into 78 paragraphs with documents marked X1-X34, as if it is the original petition.

The Respondents in the written submission have stated that the Petitioner purposely presented a different case by way of counter objections, knowing very well that the Respondents will not have an opportunity to respond, which is against the Rules and principles of natural justice, and therefore the new positions taken up by the Petitioner in the counter objections should be disregarded.<sup>3</sup>

It is elementary that a plaintiff cannot take up in the trial a position different from what he took in his plaint. An appellant cannot in appeal take up a position different from what he took in the lower Court. Similarly, a Petitioner cannot in a writ application take up a new position in the counter objections from what he took in the original petition. The character of the action cannot be changed in the guise of filing counter objections.

Let me first sort out the writ applications filed by the Petitioners who state they have Permits issued under the Land Development Ordinance.

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<sup>2</sup> Vide paragraph 3 of the written submission of the Petitioner filed on 19.09.2019 with notice.

<sup>3</sup> Vide paragraphs 6-9 of the written submission of the Respondents filed on 05.09.2019 with notice.

If they have valid Permits issued under the Land Development Ordinance, they do not need to produce them to this Court seeking to quash the Notice to Quit. They can, nay, they shall, if they wish, tender them to the Magistrate's Court as a defence.

Section 9 of the State Lands (Recovery of Possession) Act reads as follows:

*At such inquiry [before the Magistrate's Court] the person on whom summons under section 6 has been served shall not be entitled to contest any of the matters stated in the application under section 5 except that such person may establish that he is in possession or occupation of the land upon a valid permit or other written authority of the State granted in accordance with any written law and that such permit or authority is in force and not revoked or otherwise rendered invalid.*

Hence, there is no difficulty in dismissing the applications filed by the alleged Permit Holders on that basis.

The Respondents in the statement of objections have taken up several objections to the maintainability of this application. Two such striking objections are delay and suppression, or misrepresentation of material facts.

Writ is a discretionary remedy. Inordinate and unexplained delay in a writ application is fatal. In this case, the impugned Quit Notice is dated 31.12.1992. The application of the Petitioner by way of petition and affidavit dated 15.12.2014 seeking to quash that Quit Notice was filed in this Court on



12.01.2015, which is more than 23 years after the impugned Notice. It is significant to note that there is nothing in the petition explaining the delay.

In the written submission, the Petitioner has stated that, as there were four different Quit Notices, the Petitioner cannot be responsible for the delay.<sup>4</sup> This belated explanation given in the written submission filed in 2019 is plainly unacceptable.

Different Quit Notices have been issued against different parties by different bodies. According to the written submission of the Petitioner, out of those four Quit Notices, only one has been issued prior to the Quit Notice under consideration.<sup>5</sup> According to paragraph 10 of the petition, that Quit Notice has been issued not by the 1<sup>st</sup> Respondent, but by the 4<sup>th</sup> Respondent against some other party. Although the Petitioner has mentioned the Magistrate's Court case number (32094/82) regarding that Quit Notice, he does not state what happened to that case. The other two Quit Notices have been issued several years after the impugned Quit Notice. There is no necessity to go into detail about those Quit Notices as they are beside the point.

In my view, this petition shall be dismissed *in limine* on unexplained and inordinate delay.

This leads me to consider the next valid objection taken up on behalf of the Respondents in relation to suppression or misrepresentation of material facts.

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<sup>4</sup> Vide paragraph 81 thereof.

<sup>5</sup> Vide page 10 of the written submission.

I do not intend to go into each and every fact the Petitioner has suppressed and misrepresented.

Although the Petitioner has filed this application as a member of the Apple Growers' Co-operative Society, through which lands were released for apple cultivation, the Respondents by tendering the Members List marked R1 has belied it. The Petitioner has not challenged R1 in the counter objections. According to the Respondents, that goes to the standing of the Petitioner in maintaining this application.

More importantly, the Petitioner in the petition has portrayed that the Respondents have, quite unexpectedly, started serving Quit Notices to evict them from the land. In reply, the Respondents with their statement of objections have tendered a number of documents to say that it was not so.

According to R4 and R5, lands were to be released through the Apple Growers' Society. R5 written by the 4<sup>th</sup> Respondent to the Apple Growers' Society is dated 17.03.1976. Thereafter, according to R6 dated 26.12.1978, the Government has decided to take back the said land from the Apple Growers' Society and hand it over to the Forest Department, to be exact, to the 1<sup>st</sup> Respondent. R6 has been sent by the Government Agent of Nuwara Eliya to the 4<sup>th</sup> Respondent with a copy to the Apple Growers' Society. Then, R7 dated 22.01.1979 has been sent by the 4<sup>th</sup> Respondent to the Secretary of the Apple Growers' Society asking the latter to be present on 01.02.1979 at the land to handover possession back to the 4<sup>th</sup> Respondent on behalf of the Government (for reforestation). As seen from R8 dated

13.02.1979, the Secretary of the Apple Growers' Society has replied to R7 by letter dated 29.01.1979 and sought further time to handover portions of land already cultivated, perhaps until the reaping of the harvest. R9-R14 go to show how different Government Agencies, including the Presidential Secretariat,<sup>6</sup> have intervened to grant further time and to regain possession of the land since 1979.

The Petitioner in the counter objections has neither referred to those documents and rejected them as fabrications, nor stated that he was unaware of those documents, but simply denied the paragraphs containing those documents "so far as they are inconsistent with the position of the Petitioner".<sup>7</sup>

The Petitioner who is seeking a discretionary remedy such as writ cannot be so evasive. He must be truthful to Court and must come to Court with clean hands. It is clear that the Petitioner suppressed material facts when he came to Court, which alone disentitles him to the equitable relief he has sought.

Upon disclosure of the said facts, the Petitioner, in his counter objections, has tendered several new documents such as X18-X23. It is not clear whether they were tendered to counter the Respondents' documents or to take up new positions.

This also tends to prove that the Petitioner did not act with *uberrima fides* when he first filed the petition in 2015. He has withheld some material documents. X18-X21 documents were already in existence when he filed the application. X22, X23 and

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<sup>6</sup> Vide R10.

<sup>7</sup> Vide paragraphs 15 and 16 of the counter objections.

X27 documents have come into being after the institution of the action. Another notable factor is X18-X21 documents are the result of the representations made to the Presidential Secretariat by a society by the name of Isuru Grama Sanwardhana Society (not Apple Growers' Society).

In the Supreme Court case of *Namunukula Plantations Limited v. Minister of Lands*<sup>8</sup> it was held:

*It is settled law that a person who approaches the Court for grant of discretionary relief, to which category an application for certiorari would undoubtedly belong, has to come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case. In other words, he owes a duty of utmost good faith (uberrima fides) to the court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence.*

The Supreme Court<sup>9</sup> further held:

*If any party invoking the discretionary jurisdiction of a court of law is found wanting in the discharge of its duty to disclose all material facts, or is shown to have attempted to*

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<sup>8</sup> [2012] 1 Sri LR 365 at 376. Vide also *Fonseka v. Lt. General Jagath Jayasuriya* [2011] 2 Sri LR 372

<sup>9</sup> At page 374

*pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person.*

Let me now consider the arguments advanced on behalf of the Petitioner in the written submission.

The Petitioner states that the Quit Notice P12 dated 31.12.1992 is invalid as the delegation of power by the Government Agent to the 1<sup>st</sup> Respondent to take steps under the State Lands (Recovery of Possession) Act by R2 ceased to have effect after 13.11.1992 with the enactment of Transfer of Powers (Divisional Secretaries) Act, No.58 of 1992. Such a clear position was never taken by the Petitioner in the petition. In any event, that argument is devoid of merit as, according to section 5 of the said Act, with the enactment of the Act all such directions issued by the Government Agents shall be deemed to have been issued by the Divisional Secretaries.

The grounds stated in sub paragraphs (a) and (b) of paragraph 28 of the petition that “*The Respondent [without stating which Respondent] is not the Competent Authority and as such ultra vires the provisions of the State Land (Recovery of Possession) Act*” and “*The said Notice (P12) has been issued totally without jurisdiction and unsupported by evidence*” are also devoid of merit.

In terms of section 18 of the State Lands (Recovery of Possession) Act, the Competent Authority in relation to any land means the Government Agent of the district in which the land is situated, and section 18(k) further states that the Government Agent also includes any other public officer authorised by the

Government Agent. After the Transfer of Powers (Divisional Secretaries) Act, the Government Agent shall be substituted by the Divisional Secretary.

It appears that when the 1<sup>st</sup> Respondent files the action, the Petitioners say the Competent Authority is the 4<sup>th</sup> Respondent; when the 4<sup>th</sup> Respondent files the action, the Petitioners say the 1<sup>st</sup> Respondent is the Competent Authority.

The 1<sup>st</sup> Respondent has not issued the Quit Notice P12 on the basis that the land belongs to the Forest Department, but on the basis of the delegation of authority by the 4<sup>th</sup> Respondent to the 1<sup>st</sup> Respondent.

Court is satisfied that the Quit Notice P12 has been issued by the Competent Authority.

The Petitioner also states in the written submission that the land was declared forest land only in 2007 by the Gazette marked X27 which was tendered with the counter objections. Such a position was not taken up by the Petitioner in the petition. The Petitioner cannot tender new documents and take up new positions in the counter objections preventing the Respondents from challenging them by way of pleadings. In any event, that argument is beside the point.

Firstly, whether this is a forest land or not is irrelevant so long as the Petitioner admits that this is a State Land. This is admittedly a State Land. Secondly, there is a difference between “forest land” and “conservation forest”,<sup>10</sup> in that, X27 Gazette

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<sup>10</sup> Vide section 3A of the Forest Conservation Ordinance.

speaks of “conservation forest”. Thirdly, there is no agreement that the land in question falls into the “Pidurutalagala Conservation Forest” stated in the said Gazette. In my view, acceptance of X27 Gazette does not help the Petitioner. It makes the Petitioner’s case worse.

Another argument of the Petitioner is that the “settlement” reached in SC Appeal No.20/2013 marked P21 in a connected case is binding on the Respondents, and therefore P12 Quit Notice is invalid. In the first place, that Judgment is against the Petitioner (although the Petitioner is not a party). Secondly, there is no settlement in that case. What the Petitioner states as the binding settlement is the following observation made by the Supreme Court.

*The learned Solicitor General also submits to this Court that he has already given directions with a view to providing some administrative relief to those persons similarly effected by notices that have been issued in terms of the State Lands Recovery of Possession Law as a matter of accommodation.*

There is no enforceable settlement not to proceed with the cases filed on the Quit Notice marked P12.

If the Petitioner thinks there is, the Petitioner can take appropriate steps in that case.

The argument that the Quit Notice P12 is invalid as it is in violation of the legitimate expectation (a) to continue to cultivate the land without any hindrance<sup>11</sup> and (b) created by the said

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<sup>11</sup> Vide paragraph 28(d) of the petition.

settlement in the Supreme Court<sup>12</sup> has no basis. The lands were initially released to promote apple cultivation, and that also not forever.

By looking at documents such as X22-X24, X25 (a)-(g) (which are Permits and Grants issued under the Land Development Ordinance), X27 Gazette (which appears to have declared this area a Conservation Forest), it seems this long-standing issue has now become complicated.

The Respondents state that *“the lands are situated over 5000 feet altitude and part of the catchment area of the Randenigala Reservoir and the illegal occupation and the cultivation of the said area by unauthorized occupants including the Petitioner by using hazardous chemicals severely affect the biodiversity of the entire conservation forest and cause siltation in the Randenigala reservoir.”*<sup>13</sup>

For the aforesaid reasons, I dismiss the application of the Petitioner, but without costs.

As agreed, the parties in the connected cases will abide by this Judgment.

Those connected cases are the following:

CA/Writ/6/2015

CA/Writ/9/2015

CA/Writ/10/2015

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<sup>12</sup> Vide paragraph 28(j) of the petition

<sup>13</sup> Vide paragraph 21 of the written submissions of the Respondents filed on 05.09.2019 with notice.



CA/Writ/11/2015  
CA/Writ/13/2015  
CA/Writ/14/2015  
CA/Writ/15/2015  
CA/Writ/16/2015  
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CA/Writ/34/2015  
CA/Writ/35/2015  
CA/Writ/37/2015  
CA/Writ/41/2015  
CA/Writ/42/2015

Judge of the Court of Appeal